NO. 22024

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LAWRENCE JOHN MINASIAN,

Appellant,

vs.

CAPT. PAUL R. ENGLE,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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APPELLEE'S BRIEF

JURISDICTIONAL STATEMENT

This is an appeal from an order of the United States District Court for the Central District of California, denying appellant's Petition for Writ of Habeas Corpus. The District Court entertained the Petition under 28 U.S.C. §2241 (1964). This Court has jurisdiction pursuant to 28 U.S.C. §2253 (1964).

Appellant filed a Petition for Writ of Habeas Corpus on April 4, 1967 (Tr. I, pp. 2-7). 1/ Appellant made no jurisdictional

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1/ For convenience, appellee hereby adopts the same system of parenthetical references as were utilized in Appellant's Opening Brief, to wit:
(Continued)

allegation in said Petition.

The District Court on April 4, 1967, issued an Order To Show Cause directing appellee to show cause why a writ of habeas corpus should not issue (not included in Transcript of Record).

On April 20, 1967, appellee filed an Answer to the aforementioned Order To Show Cause; Return to the Petition for Writ of Habeas Corpus (Tr. I, pp. 14-19). No Traverse was filed by appellant.

Among other affirmative defenses, appellee alleged that appellant failed to state a claim upon which relief can be granted; and the court lacked jurisdiction of the subject matter of this suit (Tr. I, p. 17).

Appellee's argument concerning jurisdiction and other affirmative defenses raised herein, follows in Point I of Argument.

1/ Continued:

Matter in the Transcript of Record: Tr. I, p. ___;
Matter in the Reporter's Transcript: Tr. II, p. ___;
Matter found in exhibits admitted into evidence as:
Petitioner's Exhibit I (Department of Defense Directive 1300.6(1962): Pet. I, p. ___;
Petitioner's Exhibit II (Part C-5210, Bureau of Naval Personnel Manual): Pet. II, p. ___;
Petitioner's Exhibit III (letter from Chief of Naval Personnel to appellant's counsel, dated March 23, 1967): Pet. III, p. ___;
Respondent's Exhibit A (Certified Military Record relative to appellant's request for discharge): Resp. A, p. ___; and,
Parenthetical references to Appellant's Opening Brief: Brief, p. ___.

STATEMENT OF THE CASE [2/]

Appellant was born July 24, 1942, is a male citizen of the United States of America (Resp. A, p. 3).

On June 7, 1961, appellant voluntarily enlisted in the Naval Reserve (Resp. A, pp. 1, 3). On January 8, 1964, appellant agreed to extend his enlistment for four years, in consideration of being deferred from active duty for three years, subject to certain conditions (Resp. A, p. 2).

From appellant's enlistment on June 7, 1961, through January 1966, he participated in Naval Reserve activities.

Appellant's Service Record reflects that he acknowledged on June 2, 1965, that he would be ordered to active duty on or about September 1965.

In July 1965, appellant applied for admission to Officers' Candidate School, which application was denied by Naval authorities (Resp. A, pp. 33-34).

Appellant submitted his request for discharge by reason of his contended conscientious objection, on or about September 18, 1965 (Resp. A, pp. 21-37).

Appellant's request for discharge was submitted pursuant

2/ Appellant's Statement of the Case erroneously asserts appellee conceded that the letter dated January 24, 1967, was not handled in accordance with regulations applicable to a request for discharge, and omits pertinent portions of the Memorandum Opinion of the District Court (Brief, pp. 5-8). In accordance with Rule 18, subdivision 3 of the Rules of this Court, appellee presents his Statement to controvert that of appellant.

to Department of Defense Directive 1300.6 (1962), (Pet. I), and Part C-5210, Bureau of Naval Personnel Manual (Pet. II), which provide for uniform procedures for the utilization of conscientious objectors in the armed forces, consideration of requests for discharge on the grounds of conscientious objection, and for discharge in appropriate cases "by reason of convenience of the government" (Pet. II, pp. 227-228).

Appellant's request for discharge dated September 18, 1965, was forwarded through channels with appropriate counseling, endorsements and recommendations by intermediate officers, and was referred to the Director, Selective Service, for advisory opinion (Resp. A, pp. 18-20). The Director, Selective Service, found that appellant would be properly classified I-A-O, if he were being considered under Selective Service Regulations (Resp. A, p. 17). Appellant's commander was advised, that based upon the information obtained from the Director, Selective Service, " * * * and all the facts and circumstances in his case, * * *" appellant's request for discharge was not approved, and he was assigned a Limited Duty Designator (L-8) as a non-combatant (Resp. A, p. 16).

By correspondence dated February 2, 1966, addressed to Chief of Naval Personnel, appellant requested reconsideration of his request for discharge (Resp. A, pp. 7-15). Appellant's request for reconsideration and attached correspondence was reviewed and denial of appellant's request for discharge was affirmed on February 11, 1966 (Resp. A, p. 4).

By letter of January 24, 1967, a "third appeal for discharge"

was made by appellant (Resp. A, pp. 42-46), wherein he refers to "previous requests" and requests review of previous requests (Resp. A, p. 42). By correspondence dated February 14, 1967, appellant was advised that after review of his final request for reconsideration of his request for discharge as a conscientious objector, the previous decision was affirmed (Resp. A, p. 39).

ISSUES RAISED ON APPEAL

Appellant, at page 8a of his Opening Brief, specifies that the District Court erred in the following particulars:

"1. The court failed to find that the letter of January 24, 1967, taken together with the matters incorporated therein by reference, and the enclosures, constituted a request for discharge.

"2. The court failed to find that the Navy had violated its own regulations in dealing with the letter of January 24, 1967.

"3. The court erred in finding that there was no change in appellant's beliefs after September 18, 1965 (Tr. I, p. 77).

"4. The court erred in finding that there was a basis in fact for the classification given appellant after the processing of his letter of January 24, 1967 (Tr. I, p. 76)."

REGULATIONS INVOLVED

Appellant sought to be released from the Naval Reserve pursuant to Department of Defense Directive 1300.6 (1962) (Pet. I), as implemented by the U. S. Navy in Part C-5210, Bureau of Naval Personnel Manual (Pet. II).

DOD 1300.6 (Pet. I) provides in pertinent part:

"SUBJECT: Utilization of Conscientious Objectors and Procedures for Processing Requests for Discharge Based on Conscientious Objection

* * *

"I. PURPOSE

"This Directive establishes uniform procedures for the utilization of conscientious objectors in the Armed Forces and consideration of requests for discharge on the grounds of conscientious objection.

* * *

"III. POLICY

"A. No vested right exists for any individual to be discharged from military service at his own request before the expiration of his term of service, whether he is serving voluntarily or involuntarily. Administrative discharge prior to the

completion of his term of service is discretionary with the service concerned, based on judgment of the facts and circumstances in the case.

* * *

"D. It is the policy of the Department of Defense that requests for discharge from the military service on the grounds of conscientious objection will be handled on an individual basis, with final determination made at the departmental headquarters of the individual's service in accordance with the facts and circumstances in the particular case and the criteria of this Directive. * * *

* * *

"F. The standards used by the Selective Service System in determining 1-O [sic] or 1-A-O [sic] classification of draft registrants prior to induction are considered appropriate for application to cases of servicemen who claim conscientious objection after entering military service. * * *

"G. In order to insure the maximum practicable uniformity among the services and between

members of the same service, advisory opinion by the Selective Service that a classification of 1-O [sic] is appropriate will normally be a requisite for discharge or release of members with less than two years active service based on conscientious objection." (Pet. I, pp. 1-3)

Part C-5210, Bureau of Naval Personnel Manual (Pet. II), contains provisions equivalent to, and implementing DOD 1300.6 (1962).

The current criteria utilized by Selective Service for classification of registrants prior to induction, as adopted by DOD 1300.6 (1962), to be applied to in-service claims of conscientious objection are found in 32 C.F.R. §1622.11 (1967) for Class I-A-O and 32 C.F.R. §1622.14 (1967) for Class I-O. (Review of 32 C.F.R. §§ 1622.11, 1622.14, reveals that there have been no changes in said sections at any time relevant to this case.)

"§ 1622.11 Class I-A-O: Conscientious objector available for noncombatant military service only.

"(a) In Class I-A-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to combatant training and service in the armed forces.

"(b) Section 6 (j) of title I of the Universal Military Training and Service Act, as amended, provides in part as follows:

> Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code."

"§ 1622.14 Class I-O: Conscientious objector available for civilian work contributing to the maintenance of the national health, safety, or interest.

"(a) In Class I-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and to be conscientiously opposed to participation in both combatant and noncombatant training and service in the armed forces.

"(b) Section 6(j) of title I of the Universal Military Training and Service Act, as amended,

provides in part as follows:

> Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code."

SUMMARY OF ARGUMENT

Appellant, as an enlisted member of the armed forces, is subject to no restraint other than that ordinarily incident to military service, is not "in custody" so as to invoke jurisdiction pursuant to 28 U.S.C. §2241 (1964). If appellant seeks judicial review of the Navy's denial of his request for discharge on any other basis, he has failed to join an indispensable party.

In processing appellant's request for discharge by reason of conscientious objection, Naval authorities have substantially complied with required procedural steps and there is basis in fact contained in the certified record (Resp. A) for denial of his request.

POINT I

APPELLANT, A VOLUNTARY ENLISTEE, ON ACTIVE DUTY IN THE UNITED STATES NAVY, IS NOT "IN CUSTODY", EITHER UNDER COLOR OF AUTHORITY OF THE UNITED STATES OR IN VIOLATION OF ITS LAWS. 28 U.S.C. §2241(c)(1)(3) (1964).

Appellant cites Orloff v. Willoughby, 345 U.S. 83 (1953), for the proposition that by virtue of the fact that "Appellant, at all times since February 23, 1966, has been on active duty with the United States Navy * * *. As such he is 'in custody' within the requirements * * *" (Brief, p. 3) of 28 U.S.C. §2241 (1964). Orloff was a conscript, whereas appellant was an enlistee; however, they share a common denominator: they each lawfully entered military status. In Orloff, supra, at pages 93-94, the court states:

> " * * * [W]e are convinced that it is not within the power of this Court by habeas corpus to determine whether specific assignments to duty fall within the basic classification of petitioner. * * *
>
> "While the courts have found occasion to determine whether one has been lawfully inducted and is therefore within the jurisdiction of the Army and subject to its orders, we have found no case where this Court has assumed to revise duty orders as to one lawfully in the service.
>
> "But the proceeding being in habeas corpus,

petitioner urges that, if we may not order him commissioned or his duties redefined, we may hold that in default of granting his requests he may be discharged from the Army. Nothing appears to convince us that he is held in the Army unlawfully, and, that being the case, we cannot go into the discriminatory character of his orders."

From the foregoing it is apparent that Orloff v. Willoughby, supra, based upon the facts alleged in appellant's Petition for Writ of Habeas Corpus, sustains appellee's affirmative defense that the court below lacked jurisdiction of the subject matter of the case at bar.

Discharge of validly enlisted military personnel who contend they have become conscientious objectors after their current enlistment commenced, is a matter solely within the discretion of military authorities and courts lack jurisdiction of such cases. Noyd v. McNamara, 267 F. Supp. 701, 708 (D.C. Colo. 1967), affirmed 378 F.2d 538 (10th Cir. 1967), cert. denied 36 U.S. L.W. 3256 (U.S. Dec. 19, 1967); Petition of Green, 156 F. Supp. 174, 181 (S.D. Cal. 1957); But cf., Brown v. McNamara, No. 16454, United States Court of Appeals for the Third Circuit, Nov. 24, 1967. 3/

It should be noted that the Honorable E. Avery Crary, in

3/ See Appendix "A".

the Memorandum Opinion herein states that he agrees with the holding in the case of Brown v. McNamara, 263 F. Supp. 686 (D. C. N. J., 1967), to the effect that the court has no jurisdiction to review requests for discharge such as this (Tr. I, pp. 76-77); but said Opinion further states:

> "However, since the petitioner in the instant matter was a reservist at the time he applied for discharge and the application for discharge was made before he was ordered to active duty, the court, out of an abundance of precaution, has assumed jurisdiction for the limited purpose noted herein." (Tr. I, p. 77)

Evidently, the court concluded there was a parallel between an inductee and a reservist not on active duty. Appellee contends there is a distinction which is crucial, to wit, the inductee has not voluntarily submitted himself to military authority; whereas, the enlistee has, upon enlistment voluntarily submitted himself to military authority, including active duty. Noyd v. McNamara, supra, p. 708.

Appellant is subject to no greater restraints than those which normally inhere in his status as an enlistee and appellant may not predicate a habeas corpus action on such restraint. United States v. Jack, 351 F. 2d 672 (2nd Cir. 1965); McCord v. Page, 124 F. 2d 68 (5th Cir. 1941).

Appellant is not "in custody" either under color of the authority of the United States or in violation of its laws. See,

Marten Crijins de Rozario v. Commanding Officer, Armed Forces Examining and Induction Station, No. 21,623, United States Court of Appeals for the Ninth Circuit, Dec. 21, 1967. Therefore, the District Court did not have jurisdiction to entertain this matter pursuant to 28 U.S.C. §2241 (1964).

If appellant is attempting to obtain judicial review of the decision of the Chief of Naval Personnel, other than by habeas corpus, he has failed to join an indispensable party. Williams v. Fanning, 332 U.S. 490 (1947); see, Yates v. Manale, 341 F.2d 294 (5th Cir. 1965); Adamietz v. Smith, 273 F.2d 385 (3rd Cir. 1960), cert. denied 363 U.S. 850; Bovard v. Young, 265 F.2d 823 (D.C. Cir. 1960).

POINT II

APPELLANT'S LETTER OF JANUARY 24, 1967, WITH THE ITEMS ATTACHED THERETO AND THE MATERIAL INCORPORATED THEREIN BY REFERENCE DID NOT CONSTITUTE A NEW REQUEST FOR DISCHARGE SO AS TO REQUIRE PROCESSING DE NOVO.

Appellant argues that his letter of January 24, 1967, together with attachments (Resp. A, pp. 42-46), constituted a new request for discharge so as to require complete processing pursuant to Part C-5210, Bureau of Naval Personnel Manual (Pet. II).

The District Court found:

"The Commanding Officer of petitioner and other Naval personnel, in acting on the application of

petitioner for discharge and his requests for further or reconsideration thereof, were entitled to reasonable discretion in their implementation of the regulations and no abuse of discretion has been established. Surely the Navy Department should not be put to the fully detailed process, as a new request, of every letter a petitioner files urging error in the decision of the Chief of Naval Personnel, as to a prior request for discharge." (Tr. I, pp. 77-78).

Appellant contends in effect (Brief, p. 21) that the request for discharge dated January 24, 1967 (Resp. A, pp. 42-46), evidences a change in his position so as to warrant discharge (I-O classification), by virtue of the determination on the part of appellant to implement his beliefs by action, to wit, refusal to continue on noncombatant duty status. Appellant cites no authority for the foregoing conclusion. Obviously, the representations of appellant relative to what his convictions dictate are a separate consideration from whether or not appellant qualifies for I-O as opposed to I-A-O. Review of appellant's January 24, 1967, request for discharge (Resp. A, pp. 42-46) will show not a single substantive factor is added to his requests of September 18, 1965 (Resp. A, pp. 21-37) and February 2, 1966 (Resp. A, pp. 6-15). From the beginning, appellant contended he was qualified for I-O classification if he were being considered under Selective Service criteria. Appellant could not purge from the record the statement of Navy

Chaplain, Lieutenant Commander Donald H. Ostrander, who chronicles appellant's actions and concludes, "beliefs are compatible with non-combatant status" (Resp. A, p. 34).

By way of observation, Chaplain Ostrander's conclusion has been borne out, for notwithstanding appellant's representations that he would not carry out his duties as a non-combatant or combatant (Resp. A, p. 11), nor could he continue to violate what he believes to be God's will (Tr. II, pp. 9-10), he has continued to carry out his military assignments as a noncombatant.

In the sworn-to Answer and Return on file herein (Tr. I, pp. 14-19), appellee alleges that appellant's requests of February 2, 1966 (Tr. I, p. 15), and January 24, 1967 (Tr. I, p. 16), were requests for reconsideration of appellant's previous request for discharge of September 18, 1965, and by such requests for reconsideration, no new relevant matter was added to said initial request.

Appellant omitted to file a Traverse to Appellee's Answer and Return.

The District Court found:

> "The Navy Department had jurisdiction to process and rule on the request for discharge of petitioner, as filed September 18, 1965, and revived for reconsideration by petitioner on February 2, 1966, and January 24, 1967." (Tr. I, p. 76).

Appellee submits that, based upon the record, the District

Court was correct in its finding that all requests after September 18, 1965, were requests for reconsideration.

Moreover, in accordance with 28 U.S.C. §2248 (1964), the allegations contained in Appellee's Answer and Return are conclusive, except to the extent that the District Court found they are not true, since appellant failed to file a Traverse. Vitale v. Hunter, 206 F.2d 826 (10th Cir. 1953).

In order for this Court to set aside the findings of fact as urged by appellant, such findings would have to be found to be "clearly erroneous" as provided in Rule 52(a), Federal Rules of Civil Procedure, 28 U.S.C. (1964). The record sustains the findings of the District Court, and with this point falls appellant's second specification of error.

POINT III

APPELLANT'S REQUEST FOR DISCHARGE AND SUBSEQUENT REQUESTS FOR RECONSIDERATION HAVE BEEN PROCESSED IN ACCORDANCE WITH REQUIRED PROCEDURE.

Part C-5210, Bureau of Naval Personnel Manual (Pet. II), provides for procedures to be followed in processing requests for discharge by reason of conscientious objection, and provides in pertinent part:

"(b) The commanding officer and a chaplain, if available, shall interview the member and review the information contained in his request. The commanding officer's endorsement shall in all cases express his opinion as to the sincerity of the man and if request or recommendation is for assignment to noncombatant duties * * *.

"(c) Immediately upon receiving a request for discharge * * * the commanding officer will advise and counsel the member concerning the provisions of Section 3103, Title 38, United States Code, * * *.

"(d) The Chief of Naval Personnel will refer the cases of all members who have completed less than 2 years of active duty to Selective Service for an advisory opinion." (Pet. II, p. 227)

Naval authorities complied with the foregoing procedures to the letter. Appellant's commander interviewed him and made appropriate entries in the record (Resp. A, pp. 33, 20). A Navy chaplain likewise interviewed appellant and made appropriate recommendations (Resp. A, p. 34). Appellant's case was forwarded to the Director, Selective Service, for advisory opinion (Resp. A, p. 18), and appellant was found to qualify as I-A-O, if he were being considered for induction (Resp. A, p. 17).

All subsequent requests by appellant are obviously requests

for reconsideration of decision by the Chief of Naval Personnel that in lieu of discharge, he would be designated a noncombatant to be assigned Limited Duty Designator (L-8) (Resp. A, p. 16), which offer no new material facts which warranted further referral to the Director, Selective Service, or other processing than accorded.

Appellant grants "that no legislation confers upon him or on anyone else a right to be discharged from military service by reason of conscientious objection." (Brief, p. 23). Department of Defense Directive 1300.6 (1962) (Pet. I) and Part C-5210, Bureau of Naval Personnel Manual (Pet. II) each provides that no vested right exists for an individual to be discharged from military service at his own request before the expiration of his term of service, and discharge prior to completion of term of service is discretionary with the service, in this case the Secretary of the Navy, based upon the facts and circumstances in the case (Paragraph III.A., DOD 1300.6 (1962) (Pet. I); and paragraph (1), Part C-5210, Bureau of Naval Personnel Manual (Pet. II).

The District Court concluded there was no denial of basic procedural fairness in processing appellant's request for discharge (Tr. I, p. 76). Even if, as appellant contends, there were a failure to follow regulations herein -- could the court order appellant released from service, based upon the facts of this case? Obviously not, perhaps the court could order reprocessing; but appellant contends that it does not follow that if a procedural omission is found to exist that ipso facto appellant is to be judicially released from service.

POINT IV

THERE IS BASIS IN FACT FOR FINDING THAT APPELLANT SHOULD BE A NONCOMBATANT.

As a preliminary matter the test to be applied, assuming, arguendo, that the court has jurisdiction, is relevant at this juncture: It is obvious from the Memorandum Opinion that the "basis in fact" test was applied by Judge Crary (Tr. I, pp. 73-76). Appellant alleged in his Petition for Writ of Habeas Corpus that "there is no substantial evidence to support his classification as an objector only to combatant military service" (Tr. I, p. 5).

Further assuming, arguendo, that the "substantial evidence" rule applies, appellee submits that the decision of the Chief of Naval Personnel is supported by substantial evidence: (1) Appellant voluntarily enlisted in the Naval Reserve of the United States on June 7, 1961 (Resp. A, pp. 1, 3); (2) In January, 1964, appellant agreed to extend his enlistment for a period of four years in consideration of being deferred from active duty for three years, upon certain conditions (Resp. A, p. 2); (3) From date of enlistment in June, 1961, through January, 1966, appellant participated in Naval Reserve training (Resp. A, pp. 5, 18); (4) On June 2, 1965, appellant acknowledged that he could expect his orders for active duty in September, 1965 (Appellant's Service File, p. 7 -- Service File is not a part of Record on Appeal); (5) In July, 1965, appellant applied for Officers' Candidate School (Resp. A, pp. 33-34); and (6) in September, 1965, prior to September 18, 1965,

appellant stated in writing he wanted to perform his active duty as a noncombatant (Resp. A, pp. 21, 33). The District Court was cognizant of the foregoing (Tr. I, p. 71).

While appellee submits that there is substantial evidence to support the Navy's decision herein, appellee contends that the District Court properly applied the "basis in fact" test, as in Selective Service cases. Witner v. United States, 348 U.S. 375 (1954); Parrott v. United States, 370 F.2d 388, 396 (9th Cir. 1966).

CONCLUSION

For the reasons stated, the Order appealed from should be affirmed.

Respectfully submitted,

WM. MATTHEW BYRNE, JR.,
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FREDERICK M. BROSIO, JR.,
Assistant U. S. Attorney,
Chief of Civil Division,

JAMES D. MURRAY,
Assistant U. S. Attorney,

Attorneys for Appellee,
Capt. Paul R. Engle.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ James D. Murray
JAMES D. MURRAY

APPENDIX "A"

UNITED STATES COURT OF APPEALS

For the Third Circuit

No. 16454

DAVID W. BROWN, Private E-2 RA 11 797 464,

Appellant,

v.

HON. ROBERT S. McNAMARA, Secretary of Defense; HON. STANLEY R. RESOR, Secretary of the Army; MAJOR GENERAL JOHN M. HIGHTOWER, Commanding General, U. S. Army Training Center, Infantry, U. S. Army, Fort Dix, New Jersey,

Appellees.

On Appeal From the United States District Court
For the District of New Jersey

Argued October 5, 1967

Before Staley, Chief Judge, and Maris and Van Dusen, Circuit Judges

OPINION OF THE COURT
(Filed November 24, 1967)

By VAN DUSEN, Circuit Judge

This appeal concerns the jurisdiction of the Federal Courts over persons in the military service. [1] The case is before the

1 The background of this case is set out in considerable detail in the able opinion of Judge Lane: Brown v. McNamara, 268 [sic] F. Supp. 686 (D. N. J. 1967).

court on appeal from an order of the District Court denying a petition for a writ of habeas corpus, requesting the discharge of appellant from the Army on the grounds of his being a conscientious objector. Appellant (Private David W. Brown) voluntarily enlisted in the Army. The petition alleges that his religious beliefs "crystalized" two weeks after beginning his basic training at Fort Dix, New Jersey, and he refused to proceed further with combat training.

Army Regulations (AR 635-20) provided a procedure for people in Private Brown's position to request discharge from the Army on the grounds of conscientious objection. Private Brown submitted the required forms, together with the required documentation, and complied fully with the procedure, including the chaplain's and psychiatrist's reports. This internal Army regulation was adopted pursuant to a Defense Department directive designed to establish uniform procedures in all branches of the Armed Services for considering discharge requests on the grounds of conscientious objection(DOD No. 1300.6). The administrative system contemplated by the Defense Department and enacted by the Army regulation is fairly detailed. But in general terms it provides for a "discretionary" discharge, consistent with the national policy of not inducting conscientious objectors. Since members of the Armed Forces are involved, however, such discharge requests will be recognized only "to the extent practicable and equitable". Certain guidelines and rules are given for exercising this discretion, including: the claimed objection cannot stem from

beliefs existing before entering the Armed Forces; each service's headquarters will decide, after consideration of the peculiar circumstances of the case; great care should be used to insure the sincerity of the claim; the same standards used by the Selective Service System for pre-induction claims should be used (an advisory I-O classification from the Selective Service will be a normal prerequisite for discharge, particularly where the applicant has less than two years of service); and no absolute objective measurements can be applied across the board. The procedure suggested allows for assignment to non-combatant duties in certain cases and the Army regulations provide for assignment to duties providing the minimum conflict with professed religious beliefs pending final decision on an application for discharge.

Private Brown's application did not receive a favorable advisory classification of I-O nor I-A-O allowing a non-combatant assignment) from the Director of Selective Service, despite several letters submitted on his behalf from outside sources attesting to his religious convictions. Both the Chaplain's report and the Commanding Officer's recommendation of disapproval made reference to Brown's contact with pacifist organizations and persons, and both concluded that his beliefs were based upon these contacts, as opposed to religious convictions. Based on this recommendation, the documents attached to the application, and the Selective Service opinion, the Adjutant General denied discharge and, accordingly, Private Brown was ordered to draw combat training equipment. Brown refused. After hearing by a Special

Court Martial and suspension of his sentence by the reviewing officer, a second refusal to obey orders led to new charges. Instead of convening a second court martial, suspension of the original sentence of three months' confinement at hard labor was vacated and Brown was ordered into confinement. 2/ The petition for a writ of habeas corpus followed, alleging that Brown was being held in violation of his rights. In general terms, appellant alleged that the Army violated its own procedure, made an incorrect determination of Brown's conscientious objector status, and followed an administrative procedure that denied Brown constitutionally required procedural and substantive due process, as well as equal protection of law.

The lower court denied any relief by way of habeas corpus, finding no constitutional infirmity in the administrative procedure used by the Army and no jurisdiction to review their factual determination under that procedure. We agree with the excellent opinion of Judge Lane on the issue of procedural due process. 3

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2 At oral argument, counsel for appellant indicated that Private Brown again refused to obey orders after his three-month sentence and thus incurred another court-martial sentence, 18 months at hard labor, to be served at Fort Leavenworth, Kansas. No good reason has been shown why transfer of petitioner-appellant Brown from Fort Dix should be restrained, as orally requested by his counsel at argument. It is noted that no written motion for such extra relief has been presented.

3 Brown v. McNamara, supra. We use the dichotomy of "procedural" and "substantive" due process in this case only to help emphasize what we do and do not decide on this appeal. We realize fully that the distinction is not always a clear line and may well break down under certain circumstances.

Regardless of the constitutional underpinnings of the right to classification as a conscientious objector, it is perfectly rational and consonant with constitutional concerns, including the separation of powers, to regard voluntarily enlisted servicemen as a distinct class from inducted civilians or servicemen in general discharged to civilian life. We therefore affirm the conclusion "that the administrative scheme set up by the Department of Defense and the Army does not of itself result in any constitutional violation." See Brown v. McNamara, supra, at 691.

Inherent in this conclusion and our approval is a decision that the Federal Courts have jurisdiction to make this review of procedural due process just as they would if the question were one of statutory construction. E.g., Harmon v. Brucker, 355 U.S. 579, 581-2 (1958).

We do not decide, however, that as a general proposition the Federal Courts lack jurisdiction to review the substantive elements of this military procedure for discharging conscientious objectors. More specifically, we do not hold that a Federal Court has no jurisdiction, no matter how arbitrary military action might be, to grant habeas corpus relief to an enlisted member of the Armed Forces who applies for discharge as a conscientious objector after commencing his active service. With this view of our jurisdiction, we reject the appellant's petition on the basis of our examination of this particular record. [4]

4 Such concerns as interference with the military are not irrelevant or necessarily of slight importance. See Warren, The Bill of Rights and the Military, 37 N.Y.U.L. Rev. 181, 197 (1962).

Whether or not our review of the question of substantive due process which may be presented in any case of a person voluntarily enlisted in military service is as broad as or limited to the "basis in fact test," Estep v. United States, 327 U.S. 114, 122-23 (1946); United States v. Seeger, 380 U.S. 163, 185 (1965), or whether an indispensable prerequisite to our exercise of jurisdiction is always the complete exhaustion of military remedies, Gusik v. Schilder, 340 U.S. 128 (1950), [5] we need not decide in this case.

The present record contains sufficient evidence to show that the Adjutant General's denial of discharge for reasons of conscientious objection was not arbitrary, or capricious, or irrational. [6] We draw specific attention to the advisory opinion of the

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5 See, also, Beard v. Stahr, 370 U.S. 41 (1962). Claimed "conscientious objector" status can always be raised as a defense to prosecution for refusing to obey orders. From any judgment or sentence, comprehensive appeal is available. 10 U.S.C. §§ 817, 859-876. This includes resort to a board of review (10 U.S.C. § 866), to the Court of Military Appeals (10 U.S.C. § 867), to the Secretary of the Army (10 U.S.C. § 874), and petition for a new trial (10 U.S.C. § 873). Appellant has not pursued all these available remedies. On this record, we are unwilling to expand the principle of Dombrowski v. Pfister, 380 U.S. 479 (1965), in order to assure for appellant determination of any constitutional issues without exposure to court martial proceedings. See Noyd v. McNamara, 378 F.2d 538, 540 (10th Cir. 1967). Counsel for appellant have referred us to the case of United States v. Taylor, No. CM 413709 (Board of Review, U.S. Army, October 24, 1966), where conscientious objection was deemed no defense to a refusal to obey orders and thus evidence on the determination of a claim as a conscientious objector was held properly excluded. We do not have the record in this case and note that this case is not a determination by the highest Army appellate authority.

6 See Burns v. Wilson, 346 U.S. 137, 142-3 (1953), where the court noted in an analogous situation:

> "For the constitutional guarantee of due process is meaningful enough, and sufficiently adaptable, to protect soldiers - as well as civilians - from the

(continued)

Director of Selective Service, to the full compliance of the Army with AR 635-20, to the requirements in DOD 1300.6 that claims will be recognized "to the extent practicable and equitable" and that claims will not be entertained if the conscientious objector's beliefs existed prior to entering the Armed Forces, to the fact that Private Brown made his claim two weeks after beginning basic training (six weeks after enlisting), to the statement of the Brigade Chaplain that "I am of the opinion that his beliefs, though sincere, are based on contacts he has had with Pacifistic Organizations and individuals rather than on Religious Convictions," and to the opinion of the Commanding Officer that Private Brown's beliefs were "mainly based on readings and influences made upon him by persons practicing pacifist policies, not on religious beliefs." [7]

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6 (continued) crude injustices of a trial so conducted that it becomes bent on fixing guilt by dispensing with rudimentary fairness rather than finding truth through adherence to those basic guarantees which have long been recognized and honored by the military courts as well as the civil courts."

7 It is noted that in his application for discharge, appellant included under "Pacifist Training": personal contact with professed pacifists, reading of literature from SANE and the World Federalists, contacts with peace groups at Yale, including "Alternative" and "Americans for Reappraisal of Far Eastern Policy," and reading the beginning of MacLuham, Understanding Media: The Extension of Man. Although, as stated above, we do not here decide the applicability of the "basis in fact" test to classification of enlistees after entering active service, this case does fulfil the requirements under the test suggested in Dickinson v. United States, 346 U.S. 389, 396 (1953), there being a showing that the Army's finding was supported by "some affirmative evidence," and the requirements suggested in United States v. Seeger, supra, at 179-80, since the record contains affirmative evidence that the appellant's opposition to military service was not "based on grounds that can fairly be said to be 'religious.' "

It is also noted that the Commanding Officer believed that (continued)

Such factors constitute a sufficient basis for the Army's decision within the guidelines of DOD 1300.6. In this posture, Private Brown's petition presents no claim sufficiently unique, nor does his position show such injustice, that we are compelled to interfere in whatever internal avenues of appeal are available to him within the Army.

For these reasons, the petitioner is not now entitled to a writ of habeas corpus and we will affirm the decision of the court below.

STALEY, Chief Judge, Concurring.

I concur in the affirmance of the district court's denial of the writ. I also agree with the majority opinion insofar as it affirms the finding of the district court that the administrative procedure used by the Army did not deny the appellant procedural due process. However, I agree with the district court's conclusion that federal courts should refuse to accept subject matter jurisdiction to pass on the factual adequacy of the Army's decision. 263 F. Supp. at 692-93. As stated in the opinion below, the exercise of such jurisdiction has properly been held to be unduly disruptive of the operation of the armed forces, and contrary to the doctrine of the separation of powers. Orloff v. Willoughby, 345 U.S. 83,

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7 (continued) "prior to his enlistment into military service, and since . . . [that time] Brown has been subjected to reading numerous papers and pamphlets concerning the 'Pacifist Program' currently being demonstrated in this country." As pointed out above, conscientious objector beliefs existing prior to entry into the Armed Forces are not grounds for discharge under AR 635-20.

93-94 (1953); Harmon v. Brucker, 243 F. 2d 613, 619 (C. A. D. C., 1957) rev'd other grounds, 355 U. S. 579 (1958).

MARIS, Circuit Judge, concurring in part and dissenting in part.

I concur with the opinion of the court in holding that the federal courts have power to review the substantive elements of the military proceedings under which Brown was denied discharge from the Army as a conscientious objector. But I cannot agree that upon such review the denial of his discharge must be upheld. For I think that the military authorities made a basic error in concluding that the fact that Brown's pacifist beliefs were based on contacts with or influences made upon him by pacifist persons and organizations was evidence that they were necessarily not religious beliefs. Quite the contrary may very well have been the case. For it can hardly be denied that the pacifist position of opposition to war stems from the Divine commands not to kill but to love one's enemies and that through the centuries most of those who have taken the pacifist position have done so on the basis of their religious beliefs. Indeed recognition of this fact is the basis of the exemption from military service and training which is granted by the Selective Service Act to conscientious objectors. As to the broad meaning of religious belief in this connection see United States v. Seeger, 1965, 380 U. S. 163.

It is true, of course, that there are pacifists who are motivated solely by political, sociological or philosophical views. But it is quite erroneous to assume, as the military authorities did in

Brown's case, that pacifist persons are necessarily not religiously motivated and that organizations supporting the pacifist position are necessarily organized and led by persons whose pacifist views stem from other than religious conviction, and to conclude from that assumption that the contacts with Brown and influences upon him by such persons and organizations did not involve religious grounds of opposition to war. On the contrary I believe it to be a fact that in this country most pacifists are religiously motivated, as the Seeger case defines such motivation, and that most organizations supporting the pacifist position are largely composed of and led by individuals so motivated. The military authorities had before them no evidence as to the actual basis of the pacifist beliefs of the persons and organizations with which Brown was in contact or as to the nature of the views which they expressed to him. Since their erroneous assumption that these must necessarily have been non-religious infects the whole record and obviously influenced their decision, I would reverse.

A True Copy:

Teste:

Clerk of the United States Court of
Appeals for the Third Circuit.